No. 85-433

Supreme Court, U.S.
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SEP 16 1985
JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL A. BISIG, JR. - - - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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26 P

QUESTION PRESENTED

Whether the government acted vindictively by indicting the Petitioner after his refusal to testify before the Grand Jury?

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LIST OF PARTIES

The following is a list of all parties involved in this proceeding and their respective counsel:

UNITED STATES OF AMERICA	Hon. Alexander T. Taft, Jr. United States Attorney 211 U. S. Courthouse Building 601 W. Broadway Louisville, Kentucky 40202
PAUL A. BISIG, JR.	Hon. C. Fred Partin Attorney-at-Law 1926 Kentucky Home Life Building 239 S. Fifth Street Louisville, Kentucky 40202
NORVIN E. GREEN, III	Hon. Richard D. Heideman Hon. A. Thomas Johnson 600 Legal Arts Building 200 S. Seventh Street Louisville, Kentucky 40202
EUGENE HARDIN, JR.	Hon. Brian K. Darling 800 Kentucky Home Life Building 239 S. Fifth Street Louisville, Kentucky 40202
EUGENE HARDIN, SR.	Hon. Paul F. Vissman Suite 312, Speed Building 333 Guthrie Green Louisville, Kentucky 40202
HARRY M. BOYER	Hon. James E. Groves, Jr. Hatzell & Groves 125 S. Seventh Street Louisville, Kentucky 40202

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No._____

PAUL A. BISIG, JR., - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The Judgment and Opinion of the United States Court of Appeals, filed on July 10, 1985, is unpublished. A copy thereof may be found in Appendix A. Because Petitioner believes the Opinion below was correct in its decision relating to the search warrant issue, said issue is not presented herein.

JURISDICTION

The unpublished Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit was rendered and filed on July 10, 1985. The Order of the United States Court of Appeals for the Sixth Circuit staying the mandate herein was entered on August 16, 1985. A copy thereof may be found in Appendix B. Pursuant to that Order, this Petition for Writ of Certiorari was timely filed.

Jurisdiction is conferred on this Court by Title 28, United States Code, Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The original indictment in this case charged three Defendants with conspiracy to manufacture and distribute methaqualone, in violation of Title 21, United States Code, Sections 841(a)(1) and 846. Petitioner and one other person were named as unindicted co-conspirators.

Thereafter, the Petitioner was subpoenaed before a federal Grand Jury where he asserted his Fifth Amendment privileges. Although the district court entered an order granting Petitioner "use immunity," he continued to refuse to answer any questions before the Grand Jury. As a consequence, the district court ordered Petitioner held in contempt, denied bail, and

ordered him jailed until he agreed to testify before the Grand jury.

On the last day of the Grand Jury's term, the day Petitioner was scheduled for release under the contempt charge, the United States secured a superceding indictment, this time naming Petitioner as a Defendant.

Petitioner subsequently entered a plea of guilty, but reserved the right, pursuant to Federal Rules of Criminal Procedure, Rule 11(a)(2), to appeal the trial court's disposition of certain pretrial matters, including the question of law raised in this instant action.

REASONS FOR GRANTING THE WRIT

The United States concedes that its overall tactic in this case was to initially "forego seeking an indictment against [Petitioner] in order to secure his testimony." The United States argues, however, that this initial decision was "no less than reasonable." See Brief for the United States filed in the Sixth Circuit, p. 20. A copy thereof may be found in Appendix C.

It is the Petitioner's contention that the United States, solely in retaliation for Petitioner's refusal to cooperate in the prosecution of his Co-Defendants, sought and obtained an indictment against him when the government possessed sufficient evidence to secure the indictment from the outset. During Petitioner's extended incarceration on the contempt charge no new or additional evidence was developed.

Surely these state of facts support the conclusion that there is a "realistic likelihood" that the prosecuting authorities responded to Petitioner's refusal to

testify by securing an indictment that otherwise would not have been secured. More likely than not, the indictment itself was the "penalty imposed" on Petitioner for exercising his Fifth Amendment rights, and, accordingly, a "presumption of vindictiveness" is certainly warranted. *United States* v. *Goodwin,* 457 U. S. 368, 381, 102 S. Ct. 2485, 2492 (1982) (reaffirming the "realistic likelihood of vindictiveness" test).

This case at bar differs from one where the prosecutor sought new or additional charges when the plea negotiations broke down, or where the prosecutor sought new or additional charges on retrial of a case that had been reversed. Here, the charges were not placed initially, but rather were placed only *after* Petitioner refused to cooperate. This is prosecutorial retaliation in its most glorious form. If the government intended to prosecute Petitioner, it should have named him as a Defendant in the original indictment, instead of having listed him as an unindicted coconspirator. The formal charges were not brought until after Petitioner made his election not to cooperate. As noted, the government could have brought the charges at the outset naming Petitioner as a Defendant in that the government was in possession of sufficient evidence by which to do so. Clearly, by sole reason of Petitioner's choice not to cooperate and testify for the government, he was penalized by being named as a Defendant in the superceding indictment.

In *United States* v. *Briggs,* 514 F. 2d 794 (CA 5, 1975), a federal Grand Jury returned an indictment against seven persons as Defendants and three persons

named as "unindicted coconspirators". Two of the three named coconspirators filed a petition in the trial court seeking entry of an order expunging the references to them in the indictment. The trial court overruled the petition, but the Fifth Circuit reversed, reasoning:

> . . . the indictment may make such additional persons defendants if there is probable cause to believe that they participated in the alleged conspiracy. We have been tendered no reason why in this case, if there was probable cause, the appellants were not included among those made defendants. Obviously, if there was no probable cause, they should not have been named conspirators — indicted or unindicted.
>
> * * *
>
> If the implied governmental interest of 'necessity to prove the conspiracy' relates to *inducing persons to testify as prosecution witnesses, the government has available other and less injurious means than those employed in this case.* (Emphasis added)

Similarly, in the case at bar, the Petitioner should have been named as a Defendant in the original indictment if the Government intended to prosecute him. *Cf. United States* v. *Gerard,* 491 F. 2d 1300 (CA 9, 1974). Since he was not named initially, the inference is that the government did not initially intend to prosecute. The government's intention to prosecute materialized only after Petitioner elected not to cooperate. Given these facts, the further inference is that the government's delayed action in naming Petitioner as a De-

fendant gives rise to a "genuine risk of retaliation". *Goodwin, supra.* Moreover, the government's admitted overall tactic of trying to induce Petitioner's testimony was itself improper. Aside from the vindictiveness issue, the historical authorized role of the Grand Jury's function does not include such tactical measures. *Briggs, supra.*

CONCLUSION

Petitioner submits that his due process rights were violated and that this Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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1926 Kentucky Home Life Bldg.
239 S. Fifth Street
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(502) 589-5051

Counsel for Petitioner,
Paul A. Bisig, Jr.

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 84-5643/44
Nos. 84-5736/37

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

EUGENE HARDIN, SR. (84-5643);
EUGENE HARDIN, JR. (84-5644);
PAUL A. BISIG, JR. (84-5736);
NORVIN GREEN, III (84-5737), - *Defendants-Appellants.*

On Appeal from the United States District Court for the Western District of Kentucky

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OPINION—Filed July 10, 1985

BEFORE: CONTIE and MILBURN; Circuit Judges; and WEICK, Senior Circuit Judge.

PER CURIAM. Defendants Eugene Hardin, Sr., Eugene Hardin, Jr., Paul A. Bisig, Jr., and Norvin E. Green, III, appeal their convictions for conspiracy to manufacture and distribute methaqualone in violation of 21 U.S.C. §§ 841(a)(1) and 846. For the reasons that follow, we affirm the convictions in all respects.

I.

In March of 1983, law enforcement officers with the F.B.I., the City of Jeffersontown, Kentucky, and Jefferson County, Kentucky, received the following information. First, the officers were told by a reliable informant that he had overheard a conversation during which defendant Eugene Hardin, Sr., stated that he (Hardin, Sr.) was involved in a venture with co-defendant Paul A. Bisig, Jr., and co-defendant Harry Boyer manufacturing methaqualone in a laboratory in a house in a rural area outside Jeffersontown, Kentucky, and that Boyer was renting the house. Second, another reliable informant also told the F.B.I. that Hardin, Sr., was involved in constructing a laboratory for the production of methaqualone. Third, the government was informed by LaGrange Tool and Die that two white males, one identified as Hardin, Sr., had acquired a die for a pill press on November 16, 1982.

The officers conducted their own investigation which revealed that Boyer had electrical service installed at 11302 Easum Road on the outskirts of Jeffersontown and that Boyer was not the property owner at that address. Jefferson County officers observed a 1979 Chevrolet displaying license number ELT-159 at the Easum Road address. (The officers subsequently discovered that a vehicle of the same description with license number ELT-154 was registered to Bisig.) Finally, the officers observed Hardin, Sr., and Boyer at the Easum Road address.

Based on this information, the law enforcement officers obtained a search warrant from a Jefferson County circuit judge. The warrant commanded a search of the premises at "11302 Easum Road" and described the premises to be searched as follows: "Story and half red brick dwelling with attached family room on rear. (See attached picture)."

The search conducted pursuant to the warrant revealed a complex, working laboratory for the production of methaqualone tablets. The officers seized chemicals in an amount estimated to be sufficient to produce Two Million, Five Hundred Thousand Dollars ($2,500,000.00) worth of finished methaqualone tablets, along with an estimated Eight Hundred Thousand Dollars ($800,000.00) worth of finished products. Fingerprints matching those of defendant Green and all of the other defendants were found, as well as personal mail belonging to Green and a chemical formula allegedly in Green's handwriting. In addition, approximately Forty Thousand Dollars ($40,000.00) worth of stolen silverware was seized.

Thereafter, defendant Bisig appeared before a federal grand jury pursuant to a subpoena where he asserted his Fifth Amendment privileges. On April 18, 1983, the district court entered an order granting Bisig immunity from prosecution based on his testimony or any evidence derived therefrom ("use immunity"). Bisig continued to refuse to answer any questions before the grand jury, and, accordingly, on April 20, 1983, Bisig was held in contempt, denied bail and ordered incarcerated until such time as he agreed to testify pursuant to the Recalcitrant Witness Statute, 28 U.S.C. § 1826.

On June 20, 1983, defendants Hardin, Sr., Hardin, Jr., and Green were indicted by the grand jury. The grand jury also named defendants Bisig and Boyer as unindicted co-conspirators. On February 28, 1984, the same grand jury indicted Bisig and Boyer as defendants in the conspiracy. The last day of the grand jury's term was February 29, 1984.

Responding to pre-trial motions, the district court ordered the stolen silverware suppressed from evidence. The court further held that the search warrant was valid

and refused to grant Bisig's motion to dismiss due to alleged prosecutorial misconduct.

Thereafter, Bisig, Green and Boyer entered pleas of guilty, reserving the right to appeal the court's disposition of the pre-trial motions pursuant to Fed. R. Crim. P. 11(a)(2). Hardin, Sr., and Hardin, Jr., were found guilty by jury verdicts. The appeals were thereafter consolidated although Boyer is not a party to this appeal.

II.

The parties have urged the following grounds for reversal of their convictions.

A. *Validity of Search Warrant.*

Defendant Green argues that the search warrant was invalid on its face because it failed to accurately describe the premises to be searched such that there was a "reasonable probability that another premises might [have been] mistakenly searched." *United States* v. *Votteller,* 544 F. 2d 1355, 1363 (6th Cir. 1976) (quoting *United States* v. *Darensbourg,* 520 F. 2d 985, 987 (5th Cir. 1975)). Green argues that there are three separate residences at 11302 Easum Road and further that the photograph attached to the warrant showed at least one other building than the one to be searched.

The test for determining whether a search warrant sufficiently describes the place to be searched was stated long ago by the Supreme Court: "It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele* v. *United States,* 267 U. S. 498, 503, 45 S. Ct. 414, 416 (1925). We hold that the search warrant in this case satisfies the *Steele* test. Although the warrant and the photograph may have left some *possibility* that one of the other buildings at 11302 Easum Road could

have been searched, such does not arise to a probability. The officers executing the warrant had the house under surveillance and knew which structure was to be searched. *See, e.g., United States,* v. *Gitcho,* 601 F. 2d 369, 372 (8th Cir.) (permissible factor in upholding search warrant is fact that premises had previously been under surveillance), *cert. denied,* 444 U. S. 871 (1979). *See also United States* v. *Hassell,* 427 F. 2d 348 (6th Cir. 1970) (per curiam) (noting that three officers remained at the premises while another left to procure the warrant). Under these circumstances the officers executing the warrant could (and did) "with reasonable effort ascertain and identify the place intended."

B. *Sufficiency of Affidavit to Establish Probable Cause.*

Defendants Green and Bisig argue that the affidavit in support of the search warrant does not establish probable cause on its face. More particularly, they argue that there is no indication as to how one of the informants acquired his information and that the corroboration of the other informant's information is based on purely innocent activity. Defendants further assert that the information regarding the purchase of the die for the pill press was stale.

"[S]o long as the magistrate had a 'substantial basis for . . . concluding[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Illinois* v. *Gates,* 462 U. S. 213, ____, 103 S. Ct. 2317, 2331 (1983) (quoting *Jones* v. *United States,* 362 U. S. 257, 271, 80 S. Ct. 725, 736 (1960)). The magistrate's determination of probable cause should be given "great deference," and the review should not be *de novo. Id.*

Pursuant to these standards, we affirm the district court's finding that the affidavit was sufficient. Under the "totality of the circumstances," *Gates, supra,* the search

warrant sufficiently demonstrates probable cause to believe "that an offense had been committed and that evidence thereof would be found on the premises to be searched." *United States* v. *Bease,* 521 F. 2d 1306, 1307 (6th Cir. 1975) (citations omitted).

The affidavit establishes direct evidence from two reliable informants that defendants were engaged in an illegal drug manufacturing venture at the Easum Road address. This information was corroborated by the defendants' presence at that address and by the purchase of the die for a pill press. In view of the fact that the criminal activity herein consisted of an elaborate drug manufacturing laboratory, which was certainly not a fleeting enterprise, the five months' lag between the receipt of the information concerning the defendants' acquisition of the die for the pill press and the issuance of the warrant does not justify a finding that the information was too stale for consideration. *See United States* v. *Webster,* 734 F. 2d 1048, 1056 (5th Cir.), *cert.* denied, 105 S. Ct. 565 (1984). Finally, the contention that some of the information supplied in the affidavit represents "innocent" behavior is not relevant. What is important is that the information provided a basis for a showing of probable cause. *See Gates, supra,* 103 S. Ct. at 2335 n. 13.

C. *Prosecutorial Misconduct.*

Defendant Bisig argues that his indictment on February 28, 1984, immediately prior to his impending release on February 29, 1984 (last day of grand jury's term), as a civil contemptor demonstrates prosecutorial vindictiveness. Bisig first notes that at the time of the indictment his release from incarceration was imminent pursuant to the terms of the statute. *See* 28 U.S.C. § 1826(a)(2) (providing that the confinement shall not exceed the life of the term of the grand jury). He argues that prosecutorial vindictiveness is demonstrated because the government de-

clined to indict him while he was incarcerated for contempt even though there was sufficient evidence to do so and instead waited until his term of confinement was due to expire. Bisig asserts the government was retaliating against him for asserting his legal right to release upon expiration of the grand jury's term.

It is clear that "an individual . . . may not be punished for exercising a protected statutory or constitutional right." *United States* v. *Goodwin,* 457 U. S. 368, 372, 102 S. Ct. 2485, 2488 (1982). However, Bisig was not exercising a protected statutory right at the time of his indictment. Because the grand jury's term had not yet expired, no right to release existed. Furthermore, at all times while he was incarcerated, Bisig held the proverbial keys to the jailhouse door. Since Bisig was not exercising a protected right, there is no basis to presume an improper vindictive motive on the part of the prosecutors. *See Goodwin, supra,* 457 U. S. at 373, 102 S. Ct. at 2488. Furthermore, this is not a case "in which a reasonable likelihood of vindictiveness exists." *Id.* We believe the prosecutors were properly acting within their authority at all times.

D. *Sufficiency of the Evidence.*

Before reviewing the arguments advanced by defendants Hardin, Sr., and Hardin, Jr., as to the sufficiency of the evidence, we note that the following standard governs:

> In evaluating a claim that the evidence is insufficient to support a conviction, the court must weigh the evidence in the light most favorable to the prosecution and determine whether a reasonable mind might fairly find guilt beyond a reasonable doubt. *United States* v. *Gibson,* 675 F. 2d 825, 829 (6th Cir. 1982), *cert. denied,* 459 U. S. 972, 103 S. Ct. 305, 74 L. Ed. 2d 285 (1982). The evidence to be considered may include circumstantial proof and reasonable inferences drawn from

the evidence. *United States* v. *Flaherty,* 668 F. 2d 566, 579 (1st Cir. 1981).

United States v. *McCullah,* 745 F. 2d 350, 354 (6th Cir. 1984).

Defendants first argue that the convictions cannot stand because the government failed to prove that one of the conspirators knowingly committed an overt act and that the overt act was knowingly done in furtherance of the conspiracy, citing *United States* v. *Myers,* 646 F. 2d 1142, 1143-44 (6th Cir. 1981). However, *Myers,* is not applicable to this cause because there is no requirement to charge an overt act in an indictment pursuant to 28 U.S.C. § 846, although if one is charged, it must be proven. *United States* v. *Dempsey,* 733 F. 2d 392, 395-96 (6th Cir.), *cert. denied,* 105 S. Ct. 389 (1984).

Since no overt acts were charged in the instant case, the government only needed to prove (1) that a conspiracy as described in the indictment was willfully formed and in existence at or about the time alleged and (2) that the accused willfully became a member of the conspiracy. As to the first element, we note that "[p]roof of some kind of formal agreement is not necessary to establish a conspiracy; to the contrary, the existence of a conspiracy may be inferred from acts done with a common purpose." *United States* v. *Ayotte,* 741 F. 2d 865, 867 (6th Cir.), *cert. denied,* 105 S. Ct. 574 (1985).

As to Count 1 (conspiracy to manufacture), the evidence is overwhelming that such a conspiracy existed. Evidence of numerous acts done with the common purpose of manufacturing methaqualone was presented from which the jury could infer the existence of a conspiracy. Furthermore, there was sufficient evidence from which the jury could find that both Hardin, Sr., and Hardin, Jr., willfully became members of the conspiracy. Once the conspiracy has

been established, only slight evidence is necessary to connect a defendant with it. *United States* v. *Chambers,* 382 F. 2d 910, 913 (6th Cir. 1967). As to Hardin, Sr., evidence connecting him to the conspiracy was presented in the form of testimony by employees of LaGrange Tool and Die that Hardin, Sr., procured equipment used in the laboratory, as well as fingerprints and surveillance placing him at the laboratory. Evidence connecting Hardin, Jr., to the conspiracy included fingerprints placing him at the laboratory, testimony that Hardin, Jr., picked up and delivered various items used in the laboratiry, and testimony that Hardin, Jr., stated that the laboratory manufactured "quaaludes."

Having determined that the evidence is suffiicient to sustain the convictions of both Hardins under Count 1 of the indictments, and since the sentences imposed for the convictions under Count 2 run concurrent with the convictions under Count 1, it is unnecessary to review the sufficiency of the evidence concerning Count 2. *See United States* v. *Harris,* 391 F. 2d 384, 390 (6th Cir. 1968) and cases cited therein.

E. *Co-Defendant Evidence.*

Defendants Hardin, Sr., and Hardin, Jr., next argue that the court erred in refusing to exclude, pursuant to Federal Rule of Evidence 403, evidence that pertained to co-defendants Green, Boyer and Bisig, who had already pleaded guilty. The Hardins argue that the totality of the individualized testimony related only to acts done by the co-defendants who were not on trial.

Under Rule 403, the admission of evidence challenged as prejudicial is within the sound discretion of the trial court. *See, e.g., United States* v. *Brady,* 595 F. 2d 359, 361 (6th Cir.), *cert. denied,* 444 U. S. 862 (1979). The reviewing court must look at the evidence in a light most favor-

able to its proponent, maximizing its probative value and minimizing its prejudicial effect. *Id.*

Under these standards, defendants' argument must fail. The evidence relating to the co-defendants not on trial was not only highly probative, but quite necessary in order for the government to establish the existence of the conspiracy. Against this value, the trial court weighed the prejudice to the defendants in the jury's hearing evidence relating to the other co-defendants who were not on trial. In holding the evidence admissible, the district court did not abuse its discretion.

F. *Jury Contact.*

Defendant Hardin, Sr., argues that the trial court erred in not declaring a mistrial after an attorney for the United States spoke to the jury out of the presence of the court and defense counsel. The incident accurred when the jury and counsel for the parties went to view evidence seized from the Easum Road house but which was not introduced in court. The jurors and the United States Attorney apparently arrived at the site ahead of defense counsel. At that point, the U. S. Attorney informed the jurors that no smoking was allowed and that questions were to be written down and given to the court. Defendant argues that as innocuous as this exchange appears, the U. S. Attorney obtained an unfair advantage in appearing to the jury as a figure of sincerity and trust.

Although such unilateral contact between the jurors and counsel for either party is improper (as admitted by the government), the incident involved herein and the district court's ruling thereon constitute harmless error and are not sufficient grounds for a mistrial or new trial.

G. *Testimony Concerning Excluded Evidence.*

Both Hardins argue that they were entitled to a mistrial after two separate witnesses made mention of the

silverware, which the court had earlier ordered to be excluded from evidence. Any error in this connection was harmless. The references were inadvertent and did not describe the silverware as stolen. Thus the jury was not in any way alerted to any irrelevant criminal activity which could have prejudiced the defendants.

H. *Jencks Act Material.*

The final argument advanced by defendants Hardin, Sr., and Hardin, Jr., is that the court committed reversible error in failing to order the government to deliver to defense counsel statements made by the government's witness, Coy Daniels, pursuant to the Jencks Act, which provides in relevant part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral state-

> ment made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500 (b) and (e).

Following Daniels' testimony, the defense duly requested any Jencks Act material. The trial court reviewed the material, which consists of an F.B.I. Form 302 prepared by an agent from notes taken while interviewing Daniels. The court determined that the material was not covered by the Jencks Act and ordered the information filed under seal for review by this court.

Whether material must be produced under the Jencks Act is a question of fact within the discretion of the trial court. *United States* v. *Cuesta,* 597 F. 2d 903, 914 (5th Cir.), *cert. denied,* 444 U. S. 964 (1979); *see also United States* v. *Stephens,* 492 F. 2d 1367, 1377 (6th Cir.), *cert. denied,* 419 U. S. 852 and 874 (1974). We have reviewed the material and concluded that the trial court's determination that the information contained on the Form 302 is not Jencks Act material is not clearly erroneous.

III.

For the reasons stated, the convictions of defendants Eugene Hardin, Sr., Eugene Hardin, Jr., Paul A. Bisig, Jr., and Norvin E. Green, III, are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 84-5736

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

PAUL A. BISIG, JR. - - - *Defendant-Appellant.*

ORDER—Filed August 16, 1985

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
John P. Hehman, Clerk

APPENDIX C

[PAGE 20 OF THE BRIEF FOR THE UNITED STATES FILED ON APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT]

In the case at bar, the initial decision of the United States to forego seeking an indictment against appellant Bisig in order to secure his testimony was no less than reasonable. However, appellant Bisig freely chose to remain confined for contempt. When it became apparent that appellant would continue to ignore the Court's order and no testimony would be forthcoming, it was incumbent on the United States to decide whether to indict appellant. The indictment was sought and rendered on February 28, 1984. As stated in *Goodwin,* 457 U. S. at 102 S. Ct. at 2493, the initial decision to attempt to obtain appellant's testimony should not "freeze" a future decision to seek an indictment when the testimony was not available.

IV.

THE EVIDENCE PRESENTED AT TRIAL CLEARLY PERMITTED THE TRIER OF FACT TO FIND APPPELLANTS EUGENE HARDIN, SR. AND EUGENE HARDIN, JR GUILTY BEYOND A REASONABLE DOUBT ON BOTH COUNTS OF THE INDICTMENT.

On June 20, 1983, the Federal Grand Jury returned a two-count indictment charging a conspiracy to manufacture and to distribute drugs involving four individuals: Eugene Hardin, Sr., Eugene M. Hardin, Jr., Norvin E. Green and William Osterritter. The indictment also named as con-conspirators, but not as defendants, two individuals: Paul Bisig and Harry M. Boyer. A superseding indictment was returned by the Federal Grand Jury on February 28, 1984 naming Bisig and Boyer as co-defendants in the conspiracy.